90-663

No. _____

Supreme Court, U.S.
FILED
OCT 23 1990
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1990

FREDERICK M. DEVER, JR.,

Petitioner,

versus

THE STATE OF OHIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, FIRST APPELLATE DISTRICT, HAMILTON COUNTY, OHIO

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QUESTION PRESENTED FOR REVIEW

Whether the petition was denied his right of confrontation granted to him by the Sixth and Fourteenth Amendments of the Constitution of the United States by the admission of testimony, pursuant to Rule 803(4), Ohio Rules of Evidence, in petitioner's trial, over his objection, from a physician concerning statements made to that physician by a young child pertaining to sexual abuse and the identification of the alleged perpetrator, where there was no evidence of abuse or physical or emotional injury, no evidence of the child-declarant's motive in making statements, for which the evidence was that the child did not understand the purpose for questions and examination, resulting in no evidence before the trial court that the statements by the child possessed any indicia of reliability, established a particularized guarantee of trustworthiness, or met the firmly rooted purpose of a Rule 803(4) admission, in which the admission of that hearsay deprived petitioner of his rights under the Confrontation Clause.

PARTIES TO THE PROCEEDING BEFORE THE COURT OF APPEALS, FIRST APPELLATE DISTRICT, HAMILTON COUNTY, OHIO

The caption of the case in this Court contains the names of all parties.

TABLE OF CONTENTS

Pages

Question Presented For Review i

Parties to the Proceedings Before the Court of Appeals, First Appellate District, Hamilton County, Ohio..... ii

Opinions Below 1

Jurisdiction..... 2

Constitutional, Statutory and Rule Provisions Involved 2

Statement of the Case 3

Reasons for Granting the Writ 10

Argument 12

Conclusion 20

Appendix.....App. 1

TABLE OF AUTHORITIES

Pages

CASES:

California v. Green, 399 U.S. 149 (1970) 15

Cassidy v. State, 74 Md. App. 1, 535 A.2d 667 (1988) 18

Chapman v. California, 386 U.S. 18 (1967) 20

Idaho v. Wright, ___ U.S. ___, 110 S.Ct. 3139 (1990) 10, 16, 17, 19

Lee v. Illinois, 476 U.S. 530 (1986) 18

Ohio v. Roberts, 448 U.S. 56 (1980) 15

Pointer v. Texas, 380 U.S. 400 (1965) 10

State v. Boston, 46 Ohio St.3d 108, 545 N.E.2d 1220 (1989) ..... *passim*

State v. Eastham, 39 Ohio St.3d 307, 530 N.E.2d 409 (1988) 13

United States v. Renville, 779 P.2d 430 (8th Cir., 1985) 5, 18

CONSTITUTIONAL PROVISIONS:

Sixth Amendment, Constitution of the United States 2, 5, 10, 19, 20

Fourteenth Amendment, Constitution of the United States 2, 10

STATUTES:

Section 2907.02, Revised Code of Ohio 2, 3

Section 2907.05, Revised Code of Ohio 2, 3

TABLE OF AUTHORITIES – Continued

Pages

RULES:

Rule 102, Rules of Evidence, Title 23, Revised Code of Ohio 2, 16

Rule 601(A), Rules of Evidence, Title 23, Revised Code of Ohio 2, 5, 15

Rule 803(4), Rules of Evidence, Title 23, Revised Code of Ohio ..... *passim*

Rule 803(24), Idaho Rules of Evidence 17

Rule 804(A)(3), Rules of Evidence, Title 23, Revised Code of Ohio 2, 9, 15

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OPINIONS BELOW

The orders of the Supreme Court of Ohio overruling petitioner's motion for leave to appeal and his claimed appeal as of right and the denial of petitioner's motion for rehearing are unreported and set forth as Appendices A and B, respectfully. The opinion of the Court of Appeals, First Appellate District, Hamilton County, Ohio, affirming the conviction of petitioner is unreported and set forth herein as Appendix C. The journal entry of the Court of Common Pleas, Hamilton County, Ohio, finding the child not competent to testify is unreported and set forth herein as Appendix D.

JURISDICTION

The Court of Appeals, First Appellate District, Hamilton County, Ohio, affirmed the judgments and sentence of the Court of Common Pleas, Hamilton County, Ohio, on January 31, 1990. The Supreme Court of Ohio refused to accept petitioner's appeal and dismissed the motion for leave to appeal and the appeal as of right on June 15, 1990. The Supreme Court of Ohio denied petitioner's motion for rehearing on July 25, 1990.

The jurisdiction of this Court is founded upon the presence of federal questions governed by the Constitution of the United States as a continuity of state appellate review to provide procedural and substantive due process safeguards within the state of Ohio's criminal justice system. The issue raised for review is denial of petitioner's right of confrontation vested to him by the Sixth and Fourteenth Amendments of the Constitution of the United States.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3) and Part III of the Rules of this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth and pertinent provisions of the Fourteenth Amendments of the Constitution of the United States are set forth in Appendix E. The pertinent provisions of Section 2907.02, Revised Code of Ohio, and Section 2907.05, Revised Code of Ohio, are set forth in Appendix F. Rules 102, 601(A), 803(4) and 804(A)(3), Rules of

Evidence, Title 23, Revised Code of Ohio, are set forth in Appendix G.

STATEMENT OF THE CASE

Petitioner was convicted by jury of the crime of rape in violation of § 2907.02, Revised Code of Ohio, and of the offense of gross sexual imposition in violation of § 2907.05, Revised Code of Ohio. On October 12, 1988, petitioner was sentenced for the rape offense by the Court of Common Pleas, Hamilton County, Ohio, to a term of incarceration in the Ohio penal system of not less than 10 nor more than 25 years, with a provision for actual incarceration of five years. The trial court imposed no sentence for the offense of gross sexual imposition finding that it merged with the crime of rape.

Petitioner's convictions rested upon the testimony of Ann Saluke, M.D., a pediatrician who examined petitioner's daughter on October 23, 1987, two days after the alleged sexual abuse averred in the indictment: October 21, 1987. Dr. Saluke was permitted to testify, over petitioner's objection on hearsay and Confrontation Clause violation grounds, as to the following:

> Q. Doctor, what did Kristen tell you happened?
>
> A. Kristen told us that her father put his pee pee in her mouth and there was some white stuff that had a yucky taste and also that he put his hands on her pee pee and his pee pee on her pee pee and she identified her genital area as pee pee.

Q. Did she identify what she meant by father's pee pee?

A. The same area.

Q. Okay, now did she describe that taste any further besides yucky taste?

A. She described it as mashed potatoes with butter.

At the time of Dr. Saluke's examination petitioner's child was four and one-half years old. The duration of the entire examination of the child was 30 minutes. Dr. Saluke stated that there was no finding of abuse and the examination and tests administered neither confirmed nor disproved sexual abuse.

Dr. Saluke stated that she did not recall the child's specific responses of whether the child understood why she was being asked questions by the physician. At the commencement of the questioning, petitioner's daughter, according to Dr. Saluke, "seemed to kind of jump from topic to topic and didn't really seem to be answering our questions and she kept looking at her mother and looking around the room and changing the subject." The child's mother left the room and Dr. Saluke then asked the child what happened.

Petitioner objected to Dr. Saluke's testimony of the child-declarant's statements on the basis that there was no adequate showing by the prosecution that the child understood the reason for the examination and the request for identification of the purported offender; that there was no evidence of any adequate understanding between patient and physician and that the child did not understand what was being asked or that identification

would be necessary for diagnosis or treatment bearing upon motive for the response; that there was nothing to establish reliability and trustworthiness of any statement; and that the purpose was for investigation not medical treatment from which petitioner was denied his right of confrontation granted to him by the Sixth Amendment of the Constitution of the United States.

The trial court overruled the objection finding that a sufficient foundation was present within medical history reasonably pertinent to treatment and that *United States v. Renville*, 779 F.2d 430 (8th Cir., 1985) was controlling.

Dr. Saluke described the protocol and "customary" practice of examining potentially abused children before she related the declarant's statements set forth above. No testimony was presented by Dr. Saluke concerning how the protocol and the "customary" practice generally employed in child abuse cases was applied to petitioner's child.

Before trial a hearing was conducted by the Court of Common Pleas on April 5, 1988, approximately five months after the alleged abuse, to examine the child, then five years of age, to determine her competency to testify pursuant to Ohio Evid.R. 601(A). She recalled the past Halloween (the period of the criminal allegation) and that in that period she went to a hospital, talked with doctors, remembered pictures presented to her and that she had placed marks on those pictures. Referring to a picture (apparently of the genitals) she was asked if that was a "pee pee" and she responded that she didn't know. When asked whether she had been touched in the genital area she replied, "no" and offered no reason for why she had

circled a portion of a picture exhibited to her. (That picture was never made a part of the record). She further stated that she had not seen that part (assumed to depict the genitals) of her "daddy" before and that no one had touched that part of her body in the past.

The child did not recall the names of persons with whom she met, but recalled meeting with hospital personnel. She did not remember telling anyone that her father had her touch his penis. The child did not recall telling someone that "white stuff" came from "daddy's pee pee," explaining that it was bubbles, and she didn't know whether the bubbles came from his penis. Responding to where it happened, she said it was in the bathtub and that her father told her to count to 100, but she counted to 11. (This information was directly related to the subsequent trial testimony of Diane Potter). Asked whether the bubbles ever got on her hands, she replied, "no" and that she had not told anyone that it had. She stated that she had never touched her father's penis with her hands and that he had never asked her to do so.

At that point, and without the opportunity for petitioner to inquire of the child, the trial court excused the child, precluding any examination by petitioner. The trial court ruled that the child understood the difference between truth and falsity and that she was a bright little girl. The judge held: "[t]he problem is she just can't relate what happened in this instance two years ago if it did occur, and for that reason I can't find her competent under Rule 601 to testify as a witness under this test." The court, however, was in error as to the two-year-time interval: the offense was alleged to have happened on

October 21, 1987; the competency hearing was a little over five months after the alleged abuse.

Petitioner filed a motion *in limine* with the trial court on June 17, 1988, seeking the exclusion of any evidence of statements made by the child on the grounds of hearsay and denial of petitioner's right of confrontation. That motion was heard by the Court of Common Pleas on August 29, 1988, at which time the trial court postponed a ruling; the trial court recognized the issue to be the reliability of the declarant's statements and the substantial guarantee of trustworthiness, *vel non*, associated with the Sixth Amendment's right of confrontation.

At trial the respondent presented two witnesses in addition to Dr. Saluke: Diane Potter who lived in the apartment above petitioner and Specialist Mike Wilson, Mariemont, Ohio, Police Department, who received a report from Ms. Potter and conducted an investigation.

Ms. Potter testified that on October 21, 1987, around 10:00 o'clock p.m. she was in her bathroom and heard the child "whining" and her father "arguing". She stated that she heard the child crying and her father saying "come on, it will take only a minute," and the child responding, "no, daddy, I'm sleeping." The witness then "heard a toilet seat" and knew that they were in the bathroom. At that point Ms. Potter heard petitioner groaning and she listened carefully. She heard petitioner tell his daughter to count to 600 and heard her counting. She then heard petitioner remark that it "feels real good," and the child say, "does that feel good daddy" with an affirmative response from petitioner and his instruction to continue to count. Ms. Patten then testified that she heard the child

say, "you got it all over my hand" and petitioner respond, "yes, I got it all over you didn't I." Ms. Potter left her house and telephoned the police.

Specialist Wilson received the telephone call from Ms. Potter and at the officer's request she came to the police department where a detailed report was prepared.

The following day, October 22, 1987, the officer spoke with the child's mother and the child was removed from the home to a relative's residence without revealing the reason to petitioner. On October 23, 1987, the policeman spoke with petitioner and the tenor of that discussion is not reported. That same day Specialist Wilson spoke with the child and her mother and they were taken by the officer to be interviewed by a social-worker member of the sexual abuse intervention team for the Hamilton County Department of Human Services. The officer's information was communicated to the social worker. An interview of the child was conducted by the social worker, in the presence of the officer, of approximately 30-to-40 minutes. The tenor of that discussion and the circumstances of the interview is not in the record. The child and her mother were taken by officer Wilson to Children's Hospital where the child was examined by Dr. Saluke.

On appeal the confrontation issue was raised and preserved although the appellate court did not directly address that issue in its decision affirming the conviction. The Court of Appeals affirmed petitioner's conviction on the authority of *State v. Boston*, 46 Ohio St.3d 108, 545 N.E.2d 1220 (1989), decided during the pendency of petitioner's appeal. The appellate court incorrectly stated the

dates of the offense and interviews of the child as February rather than the correct month as October, and incorrectly placed the age of the child as three and one-half years old when she was in fact four and one-half years old, which was of significance in the erroneous finding that the child was three and one-half years at the time of the alleged offenses and five and one-half years of age at the time of the proceedings. This in part may have been the result of the appellate court adopting the statement of the trial court's determination of the competency issue in which the trial court erroneously stated: "[t]he problem is she just can't relate what happened in this instance two years ago, if it did occur."

The Court of Appeals followed the *State v. Boston, supra,* guidelines, but disregarded the Ohio admissibility test requiring specific and independent evidence of physical or emotional abuse. The appellate court further concluded that "the trial court precluded the victim from testifying because she could not remember the events constituting the alleged crime." The record, however, does not support a finding by either the trial or appellate courts to conclude that the child could not remember the events, rather an inference was drawn by both courts that while the child remembered things very well she stated that nothing happened and it is that statement from which the erroneous conclusion was reached that the child didn't remember the events which constituted a crime. A lack of memory of the subject matter to qualify the child as an unavailable witness pursuant to Evidence Rule 804(A)(3) was not warranted from the record.

Petitioner presented the constitutional issue to the Supreme Court of Ohio, but that court declined jurisdiction to address the issue and denied rehearing although petitioner advised that court of this Court's decision released June 27, 1990, *Idaho v. Wright*, ___ U.S. ___, 110 S.Ct. 3139, which was submitted as adequate authority on the constitutional issue raised by this case.

REASONS FOR GRANTING THE WRIT

Petitioner seeks a review by this Court to recognize his deprivation of confrontation in a criminal prosecution as granted to him by the Sixth Amendment of the Constitution of the United States and as the Confrontation Clause is made applicable to the states by the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400, 403, 406 (1965).

Prior to trial and during a witness-competency hearing the court terminated the examination and released the child witness precluding petitioner from making any inquiry or otherwise exercising his right of confrontation. During the trial, over petitioner's objection on hearsay and Confrontation Clause repugnancy grounds, the examining physician, who found no evidence of any physical or emotional sexual abuse and concluded that there was neither confirmed nor disproved sexual abuse, was permitted to state what the child had allegedly told that physician, including the identity of the alleged perpetrator, petitioner. The physician's testimony was received by the trial court pursuant to Ohio's Evid.R. 803(4). However, the respondent offered no evidence to

support an indicia of reliability and a particularized guarantee of trustworthiness of the child's statements to the physician, relying solely upon the hearsay exception codified in Ohio Evid.R. 803(4). Significantly, the physician could not state that the child, age four and one-half years, understood or appreciated the purpose for the questions or examination, or in any manner responded with a motive which sought medical treatment.

A four and one-half-year-old child possessing no apparent or discernible injury, physical or emotional, of whom the record reflects does not understand the purpose for the questions and examination, is not an individual to whom her statements can be ascribed as reliable and trustworthy in responses to questions by a physician in accord with the purpose for a firmly rooted hearsay exception recognized by Evid.R. 803(4). The failure to show a particularized guarantee of trustworthiness and the presence of some indicia of reliability by the respondent deprives petitioner of his right of confrontation.

ARGUMENT

Whether the petitioner was denied his right of confrontation granted to him by the Sixth and Fourteenth Amendments of the Constitution of the United States by the admission of testimony, pursuant to Rule 803(4), Ohio Rules of Evidence, in petitioner's trial, over his objection, from a physician concerning statements made to that physician by a young child pertaining to sexual abuse and the identification of the alleged perpetrator, where there was no evidence of abuse or physical or emotional injury, no evidence of the child-declarant's motive in making statements, for which the evidence was that the child did not understand the purpose for questions and examination, resulting in no evidence before the trial court that the statements by the child possessed any indicia of reliability, established a particularized guarantee of trustworthiness, or met the firmly rooted purpose of a Rule 803(4) admission, in which the admission of that hearsay deprived petitioner of his rights under the Confrontation Clause.

Statements made to a physician during examination for purposes of medical diagnosis and treatment are traditionally trustworthy and reliable as recognized under the common law and as codified by Ohio's Evid.R. 803(4) and its counterpart in federal courts, and in several sister-states. The essence of this hearsay exception codified in Evid.R. 803(4) is the circumstantial guarantees of trustworthiness of statements made for the purpose of treatment being found to exist in a person's motive for seeking treatment.

Ohio recognizes the reliability of statements made by patients to physicians as derived from the presumption that the patient will be truthful about one's physical condition because of the risk of harmful treatment resulting from false statements, motivating the declarant to tell

the truth. *State v. Boston*, 46 Ohio St.3d 108, 545 N.E.2d 1220, 1225, 1233 (1989); *State v. Eastham*, 39 Ohio St.3d 307, 530 N.E.2d 409, 413 (1988). (H. Brown, J., concurring).

The rationale of Evid.R. 803(4) to create a hearsay exception and to remove implication of the Confrontation Clause in the admission of a young child's statements to a physician requires a showing by the proponent of the statements that there is some indicia of reliability and a particularized guarantee of trustworthiness for the admission of the statements. At the least, the proponent for admission of the out-of-court statements must establish that the child understood the purpose for the questions seeking the statements and was motivated to tell the truth for purposes of the examination leading to diagnosis and potential treatment. In short, the state of mind of the declarant at the time that the statements were made must be established as being within the rationale of Evid.R. 803(4).

Ohio has recognized the state-of-mind fault in the Evid.R. 803(4) admission of a child-declarant's statements through the testimony of a physician: "[w]e have serious reservations, in this case, that this is correct and in other cases as well where the child involved is of tender years." *State v. Boston*, 545 N.E.2d, at 1233. The court acknowledges that in order to comply with Evid.R. 803(4), the child's statement must have been motivated by her desire for medical diagnosis or treatment. *State v. Boston*, 545 N.E.2d, at 1234. The *Boston* plurality observed that to avoid the predicament of ascertaining a very young child's motivation in child abuse cases, some Ohio courts have applied Evid.R. 803(4) and, in other jurisdictions its

pertinent counterpart, as if there were no motivational component. *Id.*

The *Boston* court acknowledges that several authorities considering the application of Evid.R. 803(4) in child abuse cases involving young children admit testimony of experts concerning a declarant's out-of-court statements without considering the motive of the child in making the statement. 545 N.E.2d, at 1234. "The reason is that we really know that such a young child is not giving the doctor the information for the required purposes required by Evid.R. 803(4). More than likely, the child does not even want to be seeing the doctor!" *State v. Boston*, 545 N.E.2d, at 1234. The use of Evid.R. 803(4) under such circumstances fails to establish the purpose required by the rule and *a fortiori* the reliability of the child's out-of-court statements to a physician.

The underlying rationale attributing reliability for the admission of a child-declarant's out-of-court statements through an examining physician pursuant to Evid.R. 803(4) is significantly undermined. Where the facts of this case implicating the Confrontation Clause consist of the 30-minute interview by the physician which produced no discernable evidence of sexual abuse coupled with the child's unresponsiveness to the physician's interview and the physician's acknowledgement that she didn't know if the child understood the reason or purpose for the questioning and the examination, one must conclude that there is no indicia of reliability and significant absence of any guarantee of trustworthiness to be attached to the declarant's out-of-court statements.

Petitioner's child was not subjected to cross-examination at the competency hearing based upon the trial court's determination that she was incompetent to testify under Evid.R. 601(A). That court terminated the child's examination without cross-examination by petitioner. The child was not presented at trial to testify. The damning hearsay testimony was admitted in the course of trial on the basis of the child's determination of incompetency as a witness pursuant to Evid.R. 601(A) and on appeal by the determination by the appellate court that the child was an unavailable witness pursuant to Evid.R. 804(A)(3).

California v. Green, 399 U.S. 149, 159 (1970), controls on the proposition that the child's unavailability for cross-examination precluded petitioner from testing her truthfulness.

Applying the constitutional standard announced by *Ohio v. Roberts*, 448 U.S. 56, 65 (1980), admission of the out-of-court statements of an unavailable declarant does not infringe on a defendant's right of confrontation if the proponent of the statement makes a good-faith effort to produce the declarant and the proposed hearsay statements have sufficient indicia of reliability to satisfy the fundamental reason and policy of the hearsay exception being used.

The essence of the Confrontation Clause issue raised here is the admission of the child's statements through Dr. Saluke absent any evidence of a "particularized guarantee of trustworthiness;" those statements did not have sufficient indicia of reliability to satisfy the essential policy and reason of the hearsay exception utilized for admission. *Cf. Ohio v. Roberts*, 448 U.S., at 66. Frustration

of the purpose of Evid.R. 803(4) to carve from it a rule of trustworthiness never within its basic rationale does not pass Confrontation Clause muster.

Irrespective of the child's availability, the Ohio rule and the constitutional requirement is that the child-declarant's out-of-court statements are admissible if those statements meet the rationale and policy of a firmly-rooted exception to the hearsay rule, such as Evid.R. 803(4). Admission under the Ohio rule is subject to the out-of-court statements having an indicia of reliability from a consideration of factors such as the age of the child, the presence of corroborative physical evidence, the child's relationship to the person to whom the statements were made, and the terminology used by the child. *State v. Boston*, 545 N.E.2d, at 1238-1239.

There is no indicia of reliability and no guarantee of trustworthiness of the declarant's statements in the record within the purpose and scope of Evid.R. 803(4), or any showing by respondent of independent evidence supporting an indicia of reliability.

This Court has considered Confrontation Clause repugnancy in the context of the admission of testimony by an examining physician of out-of-court statements of a two and one-half-year-old child. *Idaho v. Wright*, ___ U.S. ___, 110 S.Ct. 3139 (1990). There the testimony was admitted under Idaho's residual hearsay exception, Evid.R. 803(24), of which Ohio has no comparable evidence rule. Ohio's Evid.R. 102 is significantly different from the Idaho and federal rule. Ohio's Evid.R. 102 requires that the evidence rules be construed in a manner consistent

with the common law. *State v. Boston*, 545 N.E.2d, at 1229-1230.

The factual similarity of *Wright* is remarkable when compared to the record of this case. 110 S.Ct., at 3143-3145.

Idaho's residual hearsay exception, Idaho Rule Evid. 803(24), as found by this Court, is not a firmly rooted hearsay exception for Confrontation Clause purposes; however, admission under a firmly rooted hearsay exception satisfies the constitutional requirement of reliability because of the weight accorded the judicial and legislative experience in assessing the trustworthiness of certain types of out-of-court statements. 110 S.Ct., at 3147. The weight accorded judicial and legislative experience underlying Evid.R. 803(4) as a firmly-rooted exception is absent for the admission of the out-of-court statements of a child who does not understand the purpose for the questions and examination and where there is no showing of the mental state and motive of the child-declarant to indicate an indicia of reliability and trustworthiness. Some evidence must be submitted by the proponent of the circumstances surrounding the statement as a requirement for admission of the out-of-court statement to establish its reliability where the policy and purpose of Evid.R. 803(4) is not met.

The " 'medical treatment' exceptions to the hearsay rule are based upon the belief that the persons making such statements are highly unlikely to lie." 110 S.Ct., at 3149. The record here demonstrates total inability to ascribe an understanding and related truthfulness of the child's statement to Dr. Saluke. Ohio questions the

reliability of a child declarant as the proper subject for Evid.R. 803(4) application as associated with the questioned state of mind of the child declarant. *State v. Boston, supra,* 545 N.E.2d, at 1225, 1233, 1234; *see, Cassidy v. State,* 74 Md. App. 1, 535 A.2d 666, 687 (1988), criticizing the rationale of *United States v. Renville,* 779 F.2d 430 (8th Cir., 1985).

This record fails to establish any factor which "relate[s] to whether the child declarant was particularly likely to be telling the truth when the statement was made," [110 S.Ct., at 3150] especially where, in considering the circumstances of the interview, there is a failure to establish the underlying rationale for admission of the statement.

To remove Confrontation Clause violation the hearsay admitted must be so trustworthy that cross-examination of the declarant would be of marginal utility. 110 S.Ct., at 3150. Cross-examination of the declarant as identified by this record was simply not of marginal utility. The absence of any background supplied by the proponent leading to the declarant's statements were factors bearing upon petitioner's Confrontation Clause challenge. *Cf.* 110 S.Ct., at 3150.

Petitioner is mindful that "[c]orroboration of a child's allegations of sexual abuse by medical evidence of abuse, for example, sheds no light on the reliability of the child's allegations regarding the identity of the abuser. There is a very real danger that a jury will rely on partial corroboration to mistakenly infer the trustworthiness of the entire statement. Furthermore, we recognize the similarity between harmless-error analysis and the corroboration inquiry when we noted in *Lee* [v. *Illinois,* 476 U.S. 530

(1986)] that the harm of 'admission of the [hearsay] statement [was that it] poses too serious a threat to the accuracy of the verdict to be countenanced by the Sixth Amendment.' " 110 S.Ct., at 3151. The corroborating testimony of Ms. Potter, upon whom the Court of Appeals placed reliance, produces several innocent inferences and but a single sinister inference. Nonetheless and contrary to the view of the Court of Appeals, such testimony does not bootstrap the statements into reliable and trustworthy statements made by a child to a physician.

Conversely, the offenses of rape and gross sexual imposition and the identity of the offender for which petitioner was found guilty and imprisoned are captured in this record within the brevity of Dr. Saluke's testimony of the child-declarant's statements consisting of three sentences in the record. There is nothing else. That evidence posed too serious a threat to the accuracy of the verdict to be countenanced by the Sixth Amendment.

The circumstances presented by this record establish that the respondent failed to show that the child's statements to Dr. Saluke possessed sufficient "particularized guarantees of trustworthiness" under the Confrontation Clause to overcome the presumption of inadmissibility. 110 S.Ct., at 3152-3153.

Petitioner was twice deprived of his right of confrontation: at the competency hearing and in the admission of Dr. Saluke's testimony of the child's statements at trial absent any foundation of the circumstances required to establish the reliability of the hearsay statements except that those statements were made to a physician which is indistinguishable from the facts of *Idaho v. Wright, supra.*

The verdict of guilt as to both charges was sustained only by the child-declarant's statements. The admission of those statements was repugnant to the Confrontation Clause of the Sixth Amendment and cannot be deemed harmless error. *Chapman v. California,* 386 U.S. 18 (1967).

CONCLUSION

For the reasons set forth, certiorari should be granted.

Respectfully submitted,

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(513) 732-6800

Attorney for Petitioner

APPENDIX A

THE SUPREME COURT OF OHIO

1990 TERM

To wit: June 13, 1990

State of Ohio, Appellee,	:	
v.	:	Case No. 90-502
Frederick Dever, Jr., Appellant.	:	ENTRY

(Filed June 15, 1990)

Upon consideration of the motion for leave to appeal from the Court of Appeals for Hamilton County, and the claimed appeal as of right from said Court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

COSTS:

Motion Fee, $40.00, paid by G. David Yaros.

(Court of Appeals No. C880712)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

APPENDIX B

THE SUPREME COURT OF OHIO

1990 TERM

To wit: July 25, 1990

State of Ohio, Appellee,	:	Case No. 90-502
v.	:	REHEARING ENTRY
Frederick Dever, Jr., Appellant.	:	(Hamilton County)

(Filed July 25, 1990)

IT IS ORDERED by the Court that rehearing in this case be, and the same is hereby, denied.

(Court of Appeals No. C880712)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

APPENDIX C

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	APPEAL NO.
Plaintiff-Appellee,	:	C-880712
	:	TRIAL NO.
vs.	:	B-875350
FREDERICK DEVER, JR.,	:	OPINION.
Defendant-Appellant.	:	

PRESENTED TO THE CLERK
OF COURTS FOR FILING

(Filed January 31, 1990)

COURT OF APPEALS

Criminal Appeal from: Court of Common Pleas

Judgment Appealed from is: Affirmed

Date of Judgment Entry on Appeal: January 31, 1990

Arthur M. Ney, Prosecuting Attorney, Leonard Kirschner, Esq., Christian J. Schaefer, Esq., and James E. Butler, Esq., 420 Hamilton County Courthouse, Court and Main Streets, Cincinnati, Ohio 45202, for Plaintiff-Appellee,

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HILDEBRANDT, J.

Defendant-appellant Frederick Dever, Jr., appeals from the judgment of the Hamilton County Court of Common Pleas in which he was found by intervention of

a jury to be guilty of rape.[1] For the reasons that follow, we affirm the trial court's judgment.

On February 21, 1987, the appellant resided with his wife and adopted daughter, Kristen, on the first floor of a two-family residence located in the village of Mariemont, Ohio. Diane Potter resided on the second floor of the building. At approximately 10:00 p.m., Potter was in her bathroom preparing to shower when she heard the appellant and Kristen talking.[2] At trial, Potter testified as follows:

> I heard Kristen crying and I heard [appellant] saying come on, come on, it will only take a minute and Kristen kept saying no, Daddy, I'm sleeping and he kept saying come on, come on, Kristen, come on, it is only going to take a minute. She said no, Daddy, I'm sleeping and then finally she said o.k. and I guess – I could hear them talking and it was just mumbling and it seemed like it was getting closer but I wasn't really paying attention at that time because I figured, I didn't really know what he was getting her up for but I figured it was something she had to do.
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> * * *
>
> And I heard – anyway, I heard the voices getting louder and then I heard the toilet seat so I knew

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[1] The appellant had been charged with rape, R.C. 2907.02, and gross sexual imposition, R.C. 2907.05. The jury returned guilty verdicts as to each count. The trial court, finding that the charges were of similar import, imposed a sentence on the rape count only.

[2] Appellant's wife was as work at the time of the events *sub judice*.

> they were in the bathroom because that's where the toilet is.
>
> . . . Then I heard them talking, I heard [appellant] groaning, he groaned three times very loudly and that was what made me really start listening, I didn't turn on the water, I just listened and I heard him tell Kristen to count to 600 and I heard her counting and then he said oh, that feels so good and she said oh, does that feel good, Daddy, and he said yes, and he told her to keep counting and she stopped and he said come on, just count to 20, just count to 20, and she said no, I don't want to. I could hear mumbling and then I heard her say, oh, daddy, you got it all over my hand and he said yes, I got it all over you, didn't I, and then I just left the house, and went next door and called the police.

T.p. 171-72.[3]

Potter reported the foregoing conversation to Specialist Mike Wilson of the Mariemont Police Department. Wilson concluded that Potter's accusations warranted an investigation. The following day, Wilson informed the appellant's wife of Potter's allegations, and arranged for the removal of the child from the appellant's control. The next day, February 23, Wilson arranged for the intervention of the sexual abuse team of the Hamilton County Department of Human Services ("HCDHS"). Wilson informed the HCDHS team that the appellant was the alleged perpetrator. With the aid of HCDHS, Kristen was examined by Ann Saluke, M.D., at Children's Hospital.

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[3] Potter explained that she could hear and understand the foregoing exchange through a heating duct that was common to both bathrooms. See, also, State's Exhibit 1.

Although Dr. Saluke's physical examination neither confirmed nor disproved a history of sexual conduct, during the exam Kristen told the doctor that she had sexual contact with appellant.

Before the trial, the trial judge determined Kristen's competency to testify.[4] At the conclusion of the pretrial hearing, the court stated:

> All right, I have to conclude the rule says those children under ten years of age who appear incapable of receiving just impressions of the facts and transactions respecting which they are examined or relating them truly and there is no question that Kristen understands the truth and the difference between the truth and false statements and that she is a bright little girl. The problem is she just can't relate what happened in this instance two years ago, if it did occur, and for that reason I can't find her competent under [Evid. R.] 601 to testify as a witness under this test.
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> * * *

T.p. 20. At trial, Dr. Saluke was permitted to testify, over the appellant's objection, concerning Kristen's statements to her, as follows:

> Kristen told us that her father put his pee pee in her mouth and there was some white stuff that had a yucky taste and also that he put his hands on her pee pee and his pee pee on her pee pee and she identified her genital area as the peepee.

T.p. 209-10.

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[4] Kristen was three and one-half years of age at the time of the alleged offenses and five and one-half years of age at the time of the proceedings below.

At the conclusion of the evidence, the jury returned the verdicts described above and the appellant was sentenced as it appears of record. Appellant now urges on appeal that the trial court erred by allowing Dr. Saluke to testify concerning what Kristen had told her about the crime *sub judice*. We are unpersuaded.

The Supreme Court of Ohio recently ruled on the use of a child's statement of identification made to an examining physician, under circumstances similar to the case before us, in *State v. Boston* (1989), 46 Ohio St. 3d 108, 545 N.E.2d 1220. In *Boston*, the abused girl awakened screaming during the night following a period of visitation with her estranged father. The child told her mother, "* * * Daddy put something up my bucket [vagina]." *Id.*, at 108, 545 N.E.2d at ___. The mother then observed redness in the vicinity of the child's genitals.

The following day the child was examined by a pediatrician, but the child refused to permit the doctor to touch her. The doctor's visual examination of the child's vaginal and anal areas yielded nothing to note

An internal physical examination of the child was not made until approximately one month later, during which time the father continued to visit her. Upon internal examination, the doctor made findings that were consistent with sexual conduct.[5] During the examination, the child told the doctor that the father was the perpetrator.

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[5] At trial, the pediatrician testified that the child suffered probable vaginal penetration and possible anal penetration.

(Continued on following page)

The child was also examined by a psychologist who observed the child " * * * play with [anatomically correct] dolls in a sexually precocious manner, [heard] the child use slang terms for genitalia, and noted signs of autonomic hyperactivity – typical of victims of child sex abuse." *Id.*, at 120, 545 N.E.2. at ___ (footnote omitted).

At Boston's trial, the mother and the two experts (the pediatrician and the psychologist) were permitted to testify about what the child told them concerning the identity of the perpetrator. The experts were further permitted to opine that the child's statements to them were truthful.

During the pretrial hearing to determine the three-year-old child's competency to testify, the child answered initial questions, sometimes by a nod of the head. She denied having been hurt and she made it clear that she did not want to talk to the judge. The court found the child incompetent to testify. During the trial, the court further explained its ruling:

> The child seems frightened, and considering the age of the child, considering and general fact of this particular case the Court based its incompetency or fact that the child was not allowed to be called on that and not on the ability of the child to understand its obligation to tell the truth and its ability to communicate.

Id., at 114, 545 N.E.2d at ___ (Emphasis omitted).

(Continued from previous page)

She further stated that "probable" meant 95-99 percent certainty while "possible" meant greater than fifty percent certainty.

In *Boston*, the Supreme Court of Ohio interpreted the trial court's ruling as having found the child to be unavailable as contemplated by Evid. R. 804(A) rather than incompetent to testify as prescribed by Evid. R. 601. The court explained:

> Thus, the trial judge really found (the victim) unavailable as a witness rather than incompetent to be a witness. We recognize that appellant contends (admittedly with some efficacy) that such a finding is not supported by the record. However, the determination of competency (and availability) is within the sole discretion of the trial court and absent a showing of an abuse of discretion, such a determination will not be disturbed by a reviewing court. We find no abuse of discretion here.

Id., at 115, 545 N.E.2d at ___ (Emphasis omitted).

In *Boston*, the Supreme Court of Ohio reversed the father's conviction of gross sexual imposition because the trial court denied him a fair trial by permitting the experts to testify that, in their opinion, the child told them the truth when she identified the father as the perpetrator. *Id.*, at 128-29, 545 N.E.2d at ___. The Supreme Court also determined that the use of expert testimony in child abuse cases is proper, *id.* at 120, 545 N.E.2d at ___, and set down guidelines for the use of such expert testimony. Among those guidelines, the court directed:

> (F) When a child declarant is unavailable and does not testify either at a hearing or trial and no exception to the hearsay rule is applicable and when "indicia of reliability" are absent, to satisfy the requirements of the Confrontation Clause the out-of-court statements must have a particularized "guarantee of trustworthiness." To show that there is a "guarantee of trust-

> worthiness," the proponent of a child's out-of-court statements must prove that a good-faith effort has been made to produce the child as a witness, there must be specific evidence of abuse, either physical or emotional, and there must be no apparent motive to falsify the out-of-court statements.

Id., at 127, 545 N.E.2d at ___ (Emphasis omitted). The court then held:

> * * * [A]n out-of-court statement of an allegedly abused child of tender years, including identification of a perpetrator, made to a qualified expert in child abuse, is admissible if the expert has independent evidence of physical or emotional abuse of the child, the child has no apparent motive for fabricating the statement and the child has been found unavailable after a good-faith effort to produce the child in court.

Id.

In the cause *sub judice*, as in *Boston*, the trial court precluded the victim from testifying because she could not remember the events constituting the alleged crimes. In both cases, the trial court concluded that the child could comprehend the differences between truthful and false statements and relate facts truly. See Evid. R. 601. Regardless of the trial judge's statements in this case concerning Kristen's competency to testify, we believe that Kristen, whom the state attempted to qualify as a witness, was *unavailable* under the Supreme Court's reasoning in *Boston*, and pursuant to Evid. R. 804. The rule states in pertinent part:

> (A) Definition of Unavailability.
>
> "Unavailability as a witness" includes situations in which the declarant:

* * *

(3) testifies to a lack of memory of the subject matter of this statement.

See *supra* at 6-7. We therefore hold that the element of unavailability, under the Supreme Court's *Boston* guidelines concerning the admissibility of a sexually abused child's out-of-court statement to an expert,[6] has been satisfied. See *supra* at 8.

Further, we find no evidence from which the trial court could have concluded that Kristen was fabricating the events set forth in her statement to Dr. Saluke. Rather, we find there was a guarantee of trustworthiness in the child's statement because the events concerning the crime related by Kristen would ordinarily have been far afield from the knowledge of a three-and-one-half-year-old child.

The fact that Dr. Saluke did not find evidence of physical or emotional abuse differentiates this case from *Boston*. However, we place great significance upon what Ms. Potter heard. Specialist Wilson, the investigating officer, made certain that he related, in great detail, the events leading up to Dr. Saluke's examination of Kristen to the HCDHS sexual abuse team. See. t.p. 54-55. Furthermore, Dr. Saluke acknowledged at trial that she was aware the appellant was the alleged perpetrator prior to Kristen's out-of-court statement to her. See. t.p. 215.

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[6] The expertise of Dr. Saluke, who had administered to approximately two hundred fifty child-abuse victims, was not challenged below.

We, therefore, hold that, under the facts of this case, Kristen's out-of-court statement was admissible during the proceedings below. Accordingly, we overrule the appellant's solitary assignment of error and affirm the trial court's judgment.

KLUSMEIER, P.J., and UTZ, J., CONCUR.

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of the release of this Opinion.

APPENDIX D

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

State of Ohio	:	
Plaintiff	:	/s/ Gorman, J.
-vs-		No: B875350
Frederick Dever	:	
Defendant	:	

Entry

(Filed April 5, 1988)

Upon hearing in open court under E.R. 601, the Court hereby determines the [alleged /s/ RHG] victim Kristen Nicole Dever not competant to testify as of this date.

_____

Judge

/s/ James E. Butler, AP

/s/ Louis Rubenstein
Attorney for Def

APPENDIX E

Constitution of the United States

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

(Effective 1791)

AMENDMENT XIV

[Pertinent Provision]

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX F

Section 2907.02, Revised Code of Ohio (Rape.)

(A)(1) No person shall engage in sexual conduct with another who is not the spouse of the offender or who is the spouse of the offender but is living separate and apart from the offender, when either of the following apply:

(a) For the purpose of preventing resistance, the offender substantially impairs the other person's judgment or control by administering any drug or intoxicant to the other person, surreptitiously or by force, threat of force, or deception.

(b) The other person is less than thirteen years of age, whether or not the offender knows the age of such person.

(2) No person shall engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force.

(B) Whoever violates this section is guilty of rape, an aggravated felony of the first degree. If the offender under division (A)(1)(b) of this section purposely compels the victim to submit by force or threat of force, whoever violates division (A)(1)(b) of this section shall be imprisoned for life.

(C) A victim need not prove physical resistance to the offender in prosecutions under this section.

* * *

Section 2907.05, Revised Code of Ohio (Gross sexual imposition.)

(A) No person shall have sexual contact with another, not the spouse of the offender; cause another, not the spouse of the offender, to have sexual contact with the offender; or cause two or more other persons, to have sexual contact when any of the following apply:

* * *

(3) The other person, or one of the other persons, is less than thirteen years of age, whether or not the offender knows the age of such person.

(B) Whoever violates this section is guilty of gross sexual imposition. Violation of division (A)(1) or (2) of this section is a felony of the fourth degree. Violation of division (A)(3) of this section is a felony of the third degree.

(C) A victim need not prove physical resistance to the offender in prosecutions under this section.

* * *

APPENDIX G

Rules of Evidence, Title 23, Revised Code of Ohio

RULE 102. PURPOSE AND CONSTRUCTION

The purpose of these rules is to provide procedures for the adjudication of causes to the end that the truth may be ascertained and proceedings justly determined. These rules shall be construed to state the common law of Ohio unless the rule clearly indicates that a change is intended and shall not supersede substantive statutory provisions.

RULE 601. GENERAL RULE OF COMPETENCY

Every person is competent to be a witness except:

(A) Those of unsound mind, and children under ten (10) years of age, who appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly and;

* * *

RULE 803. HEARSAY EXCEPTIONS; AVAILABILITY OF DECLARANT MATERIAL

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

* * *

(4) Statements for Purposes of Medical Diagnosis or Treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

RULE 804. HEARSAY EXCEPTIONS; DECLARANT UNAVAILABLE

(A) Definition of Unavailability. "Unavailability as a witness" includes situations in which the declarant:

* * *

(3) testifies to a lack of memory of the subject matter of his statement; or

* * *